Vulcan Iron Works, Inc. *and* Carpenters & Millwrights Local Union No. 3119, affiliated with United Brotherhood of Carpenters & Joiners of America. Case 11–CA–15869

January 11, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

On September 23, 1994, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this case to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Vulcan Iron Works, Inc., Cloverdale, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the three discharges here were discriminatory, we find it unnecessary to rely on his conclusion that the Respondent knew the employees were union adherents based on information that employee Gregory Bishop supplied concerning the source of his training as a millwright. We note, as did the judge, that the Respondent clearly had knowledge of the employees' union activity before discharging them because they wore union insignia on their hardhats when they unconditionally sought to return to work following their brief strike.

Joseph T. Welch, Esq., for the General Counsel.
Michael Feinmel, Esq., for the Respondent.
Mr. James E. Wright, Business Representative, of Roanoke, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. The original charge was filed on February 18, 1994,[1] and an amended charge on April 4, by Carpenters & Millwrights Local Union No. 3119, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union). Complaint issued on April 6, and an amendment thereto on July 22. As amended, the complaint alleges that Vulcan Iron Works, Inc. (Respondent, or the Company), on February 8, terminated and thereafter failed to reinstate employees Christopher Montgomery (Montgomery), Brian Brougham (Brougham), and Gregory Bishop (Bishop), because they joined or assisted the Union and engaged in protected, concerted activities. Such conduct, the amended complaint alleges, was violative of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

This case was heard before me on August 5, in Roanoke, Virginia. Thereafter, the General Counsel and the Respondent filed briefs.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings and service of the charge establish that Respondent is a Pennsylvania corporation engaged in the renewal and replacement of cement manufacturing machinery and equipment, with an office in Wilkes-Barre, Pennsylvania,[2] and various jobsites including one at the Roanoke Cement Company in Cloverdale, Virginia. During the 12 months preceding issuance of the complaint, a representative period, Respondent purchased and received at its Cloverdale, Virginia jobsite goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Virginia, and performed services valued in excess of $50,000 in States other than the Commonwealth of Virginia. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNION ACTIVITY AND THE UNION'S STATUS AS A LABOR ORGANIZATION

The amendment to the complaint alleges that Respondent discharged the employees named above in part because of their union activity. However, neither the complaint nor the amendment alleges that the Union is a labor organization within the meaning of the Act.

The three alleged discriminatees attended a union meeting on the evening of February 3, a Thursday. About 22 persons were present. Montgomery, a union vice president, testified that the meeting constituted a ''course'' in how to get hired by nonunion contractors in order to organize them. On cross-examination, he stated that signing of cards was discussed as a technique to get an employer to recognize the Union. Various types of strikes, including ''wage increase'' strikes, were discussed.

I conclude that the Union is an organization in which employees participate, and which exists in whole or in part for the purpose of dealing with employers concerning labor disputes, wages, rates of pay, hours of work, or conditions of employment. Although the Union's status as a labor organization was not alleged, Respondent's cross-examination of Montgomery demonstrates that the issue was fully litigated. *Hacienda Hotel & Casino*, 254 NLRB 56 fn. 2 (1981). Ac-

[1] All dates are in 1994 unless otherwise indicated.

[2] The office address is 1050 Mellon Bank Center, Wilkes-Barre, Pennsylvania 18711. G.C. Exh. 1(B).

cordingly, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Hiring of Bishop and Montgomery*

The Company placed an ad in a local newspaper on January 23, asking for a total of 13 employees as ''Temporary Help, 3 to 4 weeks.'' Millwrights were included in the category of employees asked to apply.[4] Bishop called the number indicated in the ad, and a secretary told him to submit a resume. He did so, but the Company did not respond. Bishop called again and spoke with Jim Davis in the first week of February.[5] Davis told him that it was a job at the Roanoke Cement plant, and asked whether he knew anything about polarizers and roller mills. Bishop replied affirmatively, and Davis replied that he would get back to him. On February 4, Davis called Bishop, and offered him a job at $12.50 an hour. Bishop asked whether the Company needed any additional help, and Davis told him to bring along a ''buddy.''

Bishop reported this conversation to Union Business Agent James Wright, who told him to call Montgomery. Bishop did so on the morning of February 4. He and Montgomery arrived at the jobsite at about 1 p.m. Bishop spoke initially with Davis, who introduced them to Job Superintendent John Jendrek and Foreman Don Daughtry.[6] The latter instructed Bishop and Montgomery to come into the office and fill out employment forms. He asked them whether they were millwrights, and Montgomery replied that they were. Daughtry said that the work was ''heavy bull work,'' and that the pay was $12.50 hourly. He added that the job would last 28 days, and that they would be working 12 hours a day, 7 days a week.

Bishop had a separate conversation with Davis, who asked where he got his training and what he knew. Davis said that the Company had another job coming up. Bishop responded that he and Montgomery were trained in optical alignment, setting sole plates, and working on any machinery.[7]

Bishop began working on the afternoon of Friday, February 4, while Montgomery, who was in street clothes, started the next day, Saturday, February 5. Except for Bishop's Friday afternoon work, both worked 12 hours daily through Saturday, Sunday, and Monday, and until 10 a.m. on Tuesday, February 8.[8]

[3] In light of my finding above, I consider it unnecessary to take judicial notice of the many Board decisions in which the United Brotherhood of Carpenters and its numerous affiliated local unions have been found to be labor organizations.

[4] G.C. Exh 5. Bishop testified that the ad is the seventh one down in the second column of the page.

[5] The pleadings establish that Jim Davis was a supervisor and an agent of the Company.

[6] The pleadings establish that Jendrek and Daughtry were supervisors and agents of the Company.

[7] On cross-examination, Bishop maintained that the Company knew they were from the Union ''from the 'git go,''' based on his statement to Davis that they had had training.

[8] The foregoing account is based on the uncontradicted testimony of Bishop and Montgomery.

B. *The Hiring of Brougham, and the Strike*

1. Summary of the evidence

Brougham received a call from Business Agent Wright on Sunday evening, and, at his suggestion, went to the jobsite the next morning with Bishop and Montgomery. He discussed employment with Foreman Daughtry, who told him it was ''dirty, bull work'' at $12.50 per hour. Brougham was hired.

On Monday evening, February 7, the three employees decided to ask for a raise. Montgomery said he would call Business Agent Wright, and did so. The employees met the next morning and designated Montgomery as their spokesman. He acknowledged that they knew that a strike might take place.

Montgomery, Bishop, and Brougham entered the trailer a few minutes after 10 a.m. on Tuesday. Montgomery wore a tape recorder concealed in his clothing. Daughtry and Jendrek were in the trailer. The ensuing conversation was recorded, and the tape and a transcript of it are in evidence.[9]

Montgomery asked for a raise because of the nature of the work they were doing, and Daughtry refused, saying the Company was ''locked into a price.'' Montgomery asked for $2.00 more, and Daughtry repeated his denial, together with Jendrek.

The three employees then said that they were going on strike for a raise. ''Well,'' Daughtry replied, ''[W]hy don't you just pack your bags and get the fuck off my premises.'' As the three employees left, Daughtry told them to get out their picket signs by the gate. ''Just be sure you spell the name of the Company right,'' he added.

The three employees then went to the union hall. Business Agent Wright advised them to attempt to return to work at the same wage rate. They returned to the jobsite a few minutes after 1 p.m., an absence of about 3 hours. This time they wore union hardhats with union insignia.

Montgomery's tape recorder again picked up the conversation. He spoke to Superintendent Jendrek and said: ''We want to see you about coming back to work. For an unconditional offer to come back to work for what we was making.'' Jendrek replied that he could not do that, because the employees ''walked off the job.'' Montgomery repeated this request several times, and both Jendrek and Daughtry refused. Said Jendrek: ''You just plain simply walked off the job. . . . I will not live with somebody walking off the job.'' The alleged discriminatees testified to the same effect, including the detail that the offer to return was at the old rate of pay.

Respondent's only witness was Superintendent Jendrek. He admitted that the employees returned to try to get back their jobs ''unconditionally,'' but denied that anything was said about coming back at the old rate of pay. Asked whether he noticed the employees' union hardhats, Jendrek replied that he ''couldn't answer that''—he always tried ''to look somebody in the eye and talk to him.''

The Company attempted to establish that Bishop, in a proceeding for unemployment compensation benefits before the Virginia Employment Commission, admitted that the employees were not engaged in a strike. The evidence consists of a record of a hearing before a Virginia Appeals Examiner in

[9] G.C. Exh. 4.

which the three alleged discriminatees herein, Respondent and another employer. (Tidewater Construction Corp.) were the parties.[10] The Company points to Bishop's statement, ''actually we weren't on strike.''[11] However, the following questions and answers at the Virginia hearing show that Bishop was referring to events at the Tidwater job. Bishop later testified at the Virginia hearing that he discussed the possibility of going on strike with his fellow employees, and Jendrek at the same hearing affirmed that one of them said, ''We're going on strike.''[12]

All of the employees testified that they were not compensated by the Union during their employment by the Company. I credit their uncontradicted testimony on this issue.

2. Discussion

The taped record of the conversations of February 8, supplemented by the employees' testimony and Jendrek's admission at the Virginia hearing, show beyond any doubt that the employees in fact did engage in a strike for higher wages at about 10 a.m. on February 8.

Jendrek admitted that the employees offered to return to work unconditionally, but denied that they offered to do so at the prior pay scale. Jendrek's testimony is unbelievable in light of the taped record that Montgomery said they offered to return ''at what they was making,'' evidence which is supplemented by the employees' testimony at the hearing. I find that the employees made an unconditional offer to return to work at their prior wage rate about 3 hours after going on strike.

Jendrek was not a truthful witness, and I find no merit in his evasive testimony that he ''could not answer'' the question of whether he noticed the employees' hardhats with union insignia when they attempted to return to work. I conclude that he saw what was right in front of him. The wearing of union insignia constitutes evidence that the wearer is a union supporter.[13] This inference is buttressed by Bishop's answering Supervisor Davis' question as to where he got his training.[14] For these reasons I conclude that Respondent knew that the employees were involved in the Union as well as protected activity. The employees' attendance at the February 3 ''course'' on organization, Montgomery's status as a union vice president, and his close consultation with Business Agent Wright during the events, warrant an inference that the employees' applications were, in part at least, organizational in nature.

C. *Legal Conclusions*

1. The General Counsel's case

The parties discuss the issues in both the allegation of a Section 8(a)(1) violation, as set forth in the complaint, and Section 8(a)(3), as alleged in the amendment. As I have found that a union was involved, and that Respondent knew it, I shall discuss the latter issues.

It is well established that the General Counsel has the burden of proving a prima facie case that is sufficient to support the inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct.[15]

The facts show that the employees asked for a raise, were refused, then announced that they were striking for a raise. After an absence of 3 hours, they returned and offered to return to work at their old rate of pay. This the Company refused to do because, its representative repeatedly said, the employees had walked off the job., i.e., had engaged in a strike.

As the Court of Appeals for the Seventh Circuit has stated with respect to similar facts, ''[T]his is an open and shut case—literally.'' *NLRB v. Jasper Seating Co.*, 857 F.2d 419 (7th Cir. 1988), enfg. 285 NLRB 550 (1987). In that case the employees engaged in a strike because of temperatures where they worked, and the court affirmed the Board's finding that their discharge for this reason was an unfair labor practice.

The Court of Appeals for the District of Columbia Circuit has come to the same conclusion, also on similar facts. *PHT, Inc. v. NLRB*, 920 F.2d 71 (D.C. Cir. 1990), enfg., 297 NLRB 228 (1989). In that case the employees engaged in a work stoppage over perceived unfair labor practices, and were discharged for that reason. The court affirmed the Board's finding that this and other actions were unfair labor practices.

Respondent argues that the employees were not engaged in protected activities. Because one employee acknowledged the possibility that the employees' actions might result in a strike, the Company contends that the employees were not really engaging in an ''economic strike.'' Rather, their intent was to ''punish'' the Company for not being a union shop. This action constituted a ''purposeful, planned attack on the Company, which had never even been approached regarding a collective bargaining unit.''[16] Respondent cites *H. B. Zachry Co. v. NLRB*, 886 F.2d 70, 74 (4th Cir. 1989), where the Court held that a paid full-time union organizer could not be an applicant for employment under Section 7 of the Act. Although Respondent agrees that none of the alleged discriminatees herein was paid by the Union during their employment, not even union officer Montgomery, it nonetheless contends that the ''rationale'' of *Zachry* applies to this case.[17] According to Respondent, the ''real '' objective of the strike was ''punishing'' the Company for not bargaining with the Union—although there was no allegation of a refusal to bargain.

There is absolutely no merit to this argument. The employees engaged in a strike for higher wages, and were fired for this reason.

In the sections of their briefs concerning the alleged 8(a)(1) violation, the parties discuss *Meyers Industries*, 281

[10] Jt. Exh. 1.

[11] Id. 8, L. 7.

[12] Id. 10, LL. 5-8; p. 40, LL. 2-5.

[13] See, e.g., *Jakel Motors*, 288 NLRB 730, 741 (1988); *Southwire Co.*, 277 NLRB 377, 381 (1985).

[14] The fact that Davis was not involved in the discharge is irrelevant. Davis was a supervisor, and his knowledge is attributable to the Company.

[15] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[16] R. Br. 7–9.

[17] Id.

NLRB 882 (1986). In light of my analysis above, I do not consider it necessary to discuss *Meyers*.[18]

2. Respondent's economic defense

a. *Summary of the evidence*

Jendrek testified that the projected schedule on the job required the arrival of a new ''rotary feeder.'' On February 1, according to Jendrek, he found out that this piece of equipment was not going to arrive on the scheduled date. Nonetheless, the Company hired 12 employees, including Montgomery and Bishop, during the first payroll period ending February 6.[19] Further according to Jendrek, welding by an outside company was not being done as fast as anticipated and Jendrek heard rumors that a mill motor sent out for rebuilding did not ''test out.'' By Sunday, February 6, Jendrek and Daughtry started talking about the effect of these alleged delays on staffing. On either Sunday or Monday, according to Jendrek, he told Daughtry, ''It's a shame we just hired these guys and if we follow the old rule of last in first out, they're going to be gone by the end of the week.'' Nonetheless, on Sunday, February 6, the Company hired Christopher Hoke,[20] and, as indicated, hired Brougham the following day, February 7. Five of the new employees were welders.[21] On February 21, the Company hired John Wickline, a laborer.[22]

Jendrek asserted that the departure of the three strikers on February 8, forced him to reschedule work, although they came back three 3 hours later.

b. *Discussion*

Respondent's own evidence demonstrates that it knew about the alleged delay in arrival of the rotary feeder on February 1, yet hired a full complement of employees during the following week. Although the Company's supervisors assertedly started talking about a layoff on February 6, they hired Hoke the same day and Brougham the following day. Despite Jendrek's assertion that the Company had a layoff policy of last-in first-out, Hoke, who was hired after Montgomery and Bishop, was retained while they were terminated for engaging in the strike.

For these reasons I conclude that Respondent's argument—that its decision not to let the alleged discriminatees return to work from the strike was based on economic considerations—is without merit. Accordingly, it has not rebutted the General Counsel's prima face case, and I find that, by discharging the three employees on February 8, 1994, because of their union activities and because they engaged in a strike, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Vulcan Iron Works, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Carpenters & Millwrights Local Union No. 3119, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act on February 8, 1994, by discharging Christopher Montgomery, Brian Brougham, and Gregory Bishop because of their Union and other protected activities.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent on February 8, 1994, unlawfully discharged Christopher Montgomery, Brian Brougham, and Gregory Bishop, it is recommended that Respondent be ordered to offer each of them reinstatement to his former position, without prejudice to his seniority or other rights and privileges or, if such position does not exist, a substantially equivalent position, dismissing, if necessary, any employee hired to fill that position, and to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying him a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[23]

I shall further recommend that issues concerning the duration of the remedy, including the issues of whether, if in fact the Cloverdale job is finished, the discriminatees would have been transferred to other jobsites, be left to the compliance stage of the proceeding. *Dean General Contractors*, 285 NLRB 573 (1988); *Elion Concrete*, 299 NLRB 1 (1990).

I shall also recommend an expunction order, and the posting of notices.

On the foregoing findings of fact and conclusions of law and the entire record, I recommend the following[24]

[18] The Charman and Member Browning have suggested that *Meyers* may no longer have ''vitality.'' *Liberty Natural Products*, 314 NLRB 630 fn. 4 (1994).

[19] R. Exh. V-1.

[20] Id.

[21] Id. It is difficult to understand why an outside firm was doing the welding when almost half of Respondents crew were welders.

[22] Id. Respondent contends that Wickline was a ''night-shift'' laborer who worked during the cleanup process—a job entirely different from those of the three alleged discriminatees. (R. Br. 11.) Actually, they did the same thing. Respondent's records show that Wickline worked 2 days, a total of 16 ''regular'' hours on February 21 and 22, and 9 ''overtime'' hours (id.).

[23] Under *New Horizons*, interest is computed at the ''short term Federal rate'' for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, Vulcan Iron Works, Inc., Cloverdale, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Carpenters & Millwrights Local Union No. 3119, allied with United Brotherhood of Carpenters & Joiners of America, AFL–CIO or any other labor organization, because of their union sympathies or activities, or other protected activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Christopher Montgomery, Brian Brougham, and Gregory Bishop reinstatement to their former positions, or if any such positions no longer exist, to a substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary any employees hired to fill these positions, and make each of them whole for any loss of earnings either may have suffered by reason of Respondent's unlawful discharge of them, in the manner described in the remedy section of this decision.

(b) Remove from its records all references to the discharges of the employees listed above, and notify each of them in writing that this had been done, and that it will not rely on any such discipline as a ground for future discipline of them.

(c) Preserve and, on request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its job for the Roanoke Cement Company at Cloverdale, Virginia, if still being worked, at any other jobsite to which employees would have been transferred as determined in the compliance proceeding, and at its Wilkes-Barre, Pennsylvania office, copies of the attached notice marked ''Appendix.''[25] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in Carpenters & Millwrights Local Union No. 3119, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO or any other labor organization, by discharging or otherwise discriminating against employees in any other manner because of their Union or other protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights in any like or related manner.

WE WILL offer Christopher Montgomery, Brian Brougham, and Gregory Bishop reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole, with interest, for any losses they may have suffered because of our unlawful discharges of them, and WE WILL remove from our records all references to the discharges.

VULCAN IRON WORKS, INC.